

THE SHERIFF FOR ZIMBABWE  
versus  
LEONARD TENDAYI NHARI  
and  
SCREENLAB (PVT) LTD  
and  
ALLIED BANK LIMITED

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 15 February 2018 & 28 March 2018

**Opposed Matter**

*Ms T Mabhungu*, for the Applicant  
*I Chiwara*, for the 1<sup>st</sup> and 2<sup>nd</sup> Claimants  
*T Chagudumba*, for the Judgement Creditor

MAKONI J: The present matter relates to interpleader proceedings instituted by the applicant on the instructions of the 1<sup>st</sup> and 2<sup>nd</sup> claimants in terms of Order 30 of the High Court Rules 1971, whereby the court is requested to determine the rightful owner of the property attached by the Applicant.

The background to the matter is that the Judgment Creditor, Allied Bank obtained judgement against in the Judgment Debtor, Stella Nhari in Case Number SC 197/14. Acting under the instructions of the Judgment Creditor, the Applicant attached movable property at number 186 Colesbury Avenue, Avondale, where the Judgment Debtor resides.

The first claimant and the Judgment Debtor are married out of community of property and they consider No.186 Colebury Avenue, Avonlea Harare as their matrimonial home.

Both 1<sup>st</sup> and 2<sup>nd</sup> claimants aver that the property that was attached by the Applicant does not belong to the Judgment Debtor but to them. The 1<sup>st</sup> claimant avers that he bought the attached

property before his marriage the Judgment Debtor. Alternatively, he avers that the attached property is matrimonial property and therefore does not belong to the Judgment Debtor.

The first claimant is a director of the 2<sup>nd</sup> Claimant. The 2<sup>nd</sup> Claimant avers that it uses No. 186 Colesbury Avonlea Harare as its offices.

It is trite law that in interpleader proceedings the claimant bears the onus of proving ownership of attached property. In *Bruce N.O v Josiah Parkes and Sons Limited* 1971 (1) RLR 154 at 156 G-I

“In my view, in proceedings of this nature the Claimant must set out the facts and allegations which constitute proof of ownership.”

In *Greenfield N.O v Blignaut and Others* 1953 (3) 597 at 598 C the court had this to say:

“In a Sheriff Interpleader, the claimant is as a general rule made the plaintiff, and the burden of proof rests upon him where the goods seized were at the time of seizure in the possession of the Judgment Debtor, possession being prima facie evidence of title.”

In *casu*, the property was attached at the matrimonial home of the Judgment Debtor. The property was therefore attached in the possession of the Judgment Debtor. This raises a presumption that the property belongs to the Judgment Debtor. See *The Sheriff of the High Court v Tiritose Consulting (Private) Limited* HH347/15 where the court states that:

“If the property was however, in the possession of the Judgment Debtor at the time of the attachment then the claimant will bear the onus of proving that they have title to the property and that the property cannot be executed in furtherance of Judgment Debtor’s debts.”

### 1<sup>st</sup> Claimant’s claim

The 1<sup>st</sup> claimant argued that the property in question was attached at his matrimonial home and that he acquired the property before his marriage to the Judgment Debtor. He further avers that the property attached is matrimonial property and therefore does not belong to the Judgment Debtor.

He averred that his marriage with the Judgment Debtor is out of community of property and no ante-nuptial agreement was entered into. He contended that since the marriage is out of community of property, no joint estate exists between him and the judgment debtor, hence the property acquired before and during the marriage remains the sole property of each party who has title.

The 1<sup>st</sup> claimant failed to produce invoices or receipts showing that the attached property belongs to him. What the 1<sup>st</sup> claimant has managed to produce is an inventory of items which he declared at the border when he came back to Zimbabwe from Namibia. The list does not have the 1<sup>st</sup> claimant's name on it neither does it have that of the 2<sup>nd</sup> claimant. Declaration forms reflect the particulars of the person together with the goods imported but the one *in casu* does not. Such list cannot be used as a proof of ownership of property, as it does not indicate who the owner of the property is.

The 1<sup>st</sup> claimant further produced the title deeds and an insurance policy which confirms that he bought the house in issue before he got married to the Judgment Debtor. He further produced a marriage certificate which reflects that the address in issue was his address at the time he got married to the Judgment Debtor.

The above documents do not assist the first claimant in this matter. The issue before the court is not whether the 1<sup>st</sup> claimant owns the house No. 186 Colesbury Avenue, Avonlea Harare. It is whether he owns the property that was attached by the applicant. The house is not amongst the property that was attached. In dealing with such an issue in *Joyce Muzanenhamo v Fishtown Investments (Pvt) Ltd and Others* SC8/2017 MAVANGIRA JA had this to say:

“In so far as the relationship between the first and the second respondents is concerned, when it is viewed against the backdrop of the given address being the second respondent’s *domicilium*, it was for the appellant to prove ownership of the property that was attached at that address. The onus was on her. The law is clear on this point that a person who is in possession of a movable thing is presumed to be the owner of it. It is also settled principle that where movable property is attached whilst in the possession of the judgment debtor at the time of the attachment, the onus of proving ownership rests on the claimant. See *Bruce N.O v Josiah Parkes & Sons (Rhodesia) Limited & Another* 1971 (1) RLR 154. The property in *casu* was attached whilst at the judgment debtor’s address and therefore in its possession...

In *casu* the appellant failed to prove ownership of the property. She did not produce any receipts that pertained directly to the attached property. The invoice related to only three items the nature of which suggests that they could not have been bought for domestic use, being very high end furniture.

The invoice was in any event not produced to prove ownership of movables but to prove her residence at the property, yet proof of residence would not suffice because it was possible for the three, the appellant, the second and third respondents all live there. They all could also be tenants at the premises.”

The same can be said of the 1<sup>st</sup> claimant in this matter.

The judgment creditor suggested that there could be collusion between the 1<sup>st</sup> claimant and the Judgment Debtor on the basis that in previous proceedings the same house was claimed by a Trust. In *The Sheriff of the High Court v Munyaradzi Majoni and Others* HH689/15 MAFUSIRE J had this to say:

“In my view, despite the real possibility of collusion between the judgment debtor and a claimant who are spouses, or in some way very closely related, the court should always free itself of stereotypes and preconceived notions. The case must be decided on the basis of the evidence placed before it. Nonetheless, the court should not be blind to the real possibility of such collusion taking place. It is just prudent to adopt a higher degree of circumspection where the claimant and the judgment debtor are closely related, whether by blood or through marriage, or if they are close business or social partners or associates, etc. than would otherwise be the case with total strangers. It is pure common sense.”

There is a possibility of collusion in this matter. The 1<sup>st</sup> claimant claims to be the owner of the house where the property was attached and yet the property was donated to a Trust way back in 2006. The question that begs an answer is why the 1<sup>st</sup> claimant would misrepresent facts to the court other than to collude with the Judgment Debtor to evade execution.

In *The Sheriff of the High Court v Kwekwe Consolidated Gold Mines (Pvt) Ltd and Another* HH39/15 MANGOTA J stated:

“It is a well-established rule of civil procedure rule that he who avers must prove on balance of probabilities what he is averring”

In *casu*, the 1<sup>st</sup> claimant has failed to prove that he is the owner of the attached property.

### 2<sup>nd</sup> Claimant's claim

The 1<sup>st</sup> claimant is the Director of the 2<sup>nd</sup> claimant. In support of its averments the 2<sup>nd</sup> claimant attached letters addressed to it using the address of the house where the attachment took place. The point is addressed in *Joyce Muzanhenamo v Fishtown Investments (Pvt) Ltd and Others* SC8/2017 MAVANGIRA JA stated:

“The invoice was in any event not produced to prove ownership of movables but to prove her residence at the property, yet proof of residence would not suffice because it was possible for the three, the appellant, the second and third respondents all live there. They all could also be tenants at the premises.”

I would want to agree with the Judgment Creditor that the letters produced by the 2<sup>nd</sup> claimant only show that the 2<sup>nd</sup> claimant operates from the premises where the attachment took place. They do not establish that the property attached is owned by the 2<sup>nd</sup> claimant.

One would have expected the 2<sup>nd</sup> claimant to produce an inventory or an asset register to prove ownership of the property. Further, the 2<sup>nd</sup> claimant did not attach any proof of ownership in the form of receipts or any purchase agreements to prove ownership of the property. I am therefore satisfied that the 2<sup>nd</sup> claimant has not set out facts and allegations which constitute proof of ownership.

There is sufficient evidence linking the Claimants to the Judgment Debtor. The 1<sup>st</sup> claimant is the husband of the judgment Debtor further to that he is the Director of the 2<sup>nd</sup> claimant, all reside and operate from the house where the property was attached.

In *The Sheriff for Zimbabwe v Gideon Gono and Others* HH548/17 in dealing with a similar issue, I stated:

“But where the property is in the possession of the claimant it raises the presumption of ownership by way of possession.”

In *Muzanenhano supra*, it was stated:

“The attached goods were thus found and attached at the second respondent’s address and therefore in its possession. The execution of writ was based on the acceptance that the premises belonged to the 2<sup>nd</sup> respondent. It is on this basis that the *onus* fell on the appellant to prove her claimed ownership of the premises. She failed to discharge the *onus*.”

In *casu*, the 1<sup>st</sup> claimant confirms that he resides with the Judgment Debtor at the place where the attachment took place. This raises the presumption that the property was in the possession of the Judgment Debtor when it was attached giving rise to *prima facie* evidence of title. In *Tiritose supra*, the court had this to say:

“Seeing that the property was attached at the judgment debtor’s place of business the claimant has the *onus* of proving title over the furniture claimed. As I stated earlier, the claimant did not produce any evidence to the effect that the furniture attached belonged to them. They simply made bold allegations without substantiating them. The probabilities in this matter favour the judgment creditor.”

The same can be said of both claimants *in casu*.

In light of the above I will make then following order:

- 1) The 1<sup>st</sup> and 2<sup>nd</sup> claimants’ claims are hereby dismissed.

- 2) The claimants are to pay the Judgment Creditor and the Applicant's costs on a legal practitioner and client scale.

*Dube-Banda Nzarayapenga and Partners*, applicant's legal practitioners  
*Coghlan Welsh and Guest*, 1<sup>st</sup> and 2<sup>nd</sup> Claimant's legal practitioners  
*Atherstone and Cook*, Judgment Creditor's legal practitioners